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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-991

CHARLES V. COSTANZA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 11, 1974.

CITATIONS TO OPINIONS BELOW

1. Order of the Court of Appeals unreported filed December 11, 1974. (App. A-1)

2. Order of the United States District Court for the Middle District of Tennessee unreported filed November 26, 1973. (App. A-4)

JURISDICTION

The Court of Appeals entered judgment on December 11, 1974. On January 6, 1975 Mr. Justice Stewart extended the time for filing this Petition to February 8, 1975. (App. A-9)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I.

Whether denying a defendant the right to cross-examine a government informer at a pre-trial hearing violates the Defendant's right of confrontation under the Sixth Amendment when the informer is the sole source supporting the government's contention that probable cause existed for the arrest, search and seizure.

II.

Whether the failure to suppress testimony and evidence obtained by a seizure of a defendant's suitcase located outside of his immediate control followed by a search conducted after the arresting officers had the suitcase firmly in their possession, well beyond the immediate control of the defendant, is violative of a permissible search incident to arrest as defined in *Chimel* v. *California.*

III.

Whether the Fourth Amendment requirement of probable cause to support a warrantless arrest is violated when the sole source for such an arrest is an informer's tip that is totally uncorroborated by any independent surveillance work conducted by the arresting officers.

IV.

Whether a defendant's constitutional right to a fair trial before an impartial judge is violated when the trial judge makes continuous interruptions, comments, and gestures in the presence of the jury to the severe prejudice of the defendant.

V.

Whether denying a request for a special cautionary instruction concerning the credibility of uncorroborated testimony given by a paid government informer where that testimony is the primary basis upon which a conviction is based, deprives a defendant of his right to a fair trial.

VI.

Whether it is improper, for impeachment purposes, for the prosecution to ask several defense witnesses if they were indicted along with a defendant in a totally independent and unrelated proceeding where no convictions have resulted.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

1. Constitution of the United States,

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Constitution of the United States,

Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

3. Constitution of the United States,

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; . . ."

4. Constitution of the United States,

Amendment XIV:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. 18 U.S.C. §4208. Fixing eligibility for parole at time of sentencing.—

"(b) If the court desires more detailed information as a basis for determining the sentence to be imposed,

the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section."

6. 21 U.S.C. §841. Prohibited acts A—Penalties

"(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner respectfully contends the Writ should be granted because the right of confrontation guaranteed by the Constitution is an essential and fundamental aspect of a defendant's right to a fair and impartial trial.

While this right of confrontation may be limited in certain instances by the trial judge, when it is completely

denied, as in the instant case, it is both repugnant to our system of due process and is violative of the Constitution.

Petitioner further respectfully contends the Writ should be granted in order to clarify the continually recurring questions surrounding the permissible scope and intensity of a search incident to an arrest.

The Courts of Appeal and District Courts have interpreted *Chimel* v. *California* in a great variety of ways, thus giving rise to inconsistent results often on essentially identical factual situations.

The questions raised in these cases will continue to be a problem until this Court issues further clarification of its holding in *Chimel* v. *California.*

STATEMENT OF THE CASE

Petitioner, Charles V. Costanza, was indicted in a one-count indictment for violation of Section 841 (a) (1) of Title 21 U.S.C. in that he allegedly knowingly and intentionally possessed with intent to distribute a quantity of cocaine, a Schedule II substance.

A Motion to Suppress was filed and a hearing held. On November 16, 1973, by written order, the District Judge upheld both the arrest and search. (App. A-4)

Petitioner subsequently renewed his motion to suppress upon grounds that the alleged informant was known to him, that the agents had reason to know that the informant had been untruthful in the past, that there were unlawful interceptions of telephonic communications involved.

An additional Motion to Suppress testimony of Agents Klick and Yarn was filed February 1, 1974 citing alleged

misrepresentations made by government agents to the Court. The order of November 26, 1973 was vacated, and further hearing was held by the Court February 8, 1974 and the Motions were denied by order February 11, 1974.

The case was tried before a jury beginning March 19, 1974 and ending March 26, 1974 with the petitioner being found guilty. On April 4, 1974 petitioner was sentenced to 15 years and a mandatory parole term of three years. Commitment was made under 18 U.S.C. §4208(b), the Court desiring more detailed information as a basis for determining sentence to be finally imposed.

Petitioner filed a proper Notice of Appeal and the case was heard by the United States Court of Appeals for the Sixth Circuit. Relief was denied by order of the Sixth Circuit on December 11, 1974. (App. A-1) The petitioner is now properly before this Court. For the purpose of the statement of facts and argument, the petitioner will be referred to as he was in the Court below, as "Appellant".

STATEMENT OF THE FACTS

On July 23, 1973, Agent Joe Grills, of the Baltimore office of the Drug Enforcement Administration, received a telephone call from an informant. The informant told him that he had been in New York and had seen a sample of cocaine in the possession of the defendant Costanza and that Costanza had tried to sell a kilo of cocaine to him and another individual for Thirty-Seven Thousand Dollars ($37,000). He stated that they had told Costanza that the price was too high and that Costanza had placed the cocaine in his suitcase, these events having occurred at the Carriage House Hotel in New York. The informant advised the agent that he thought the defendant had gone

to Nashville and that he was of the opinion that the defendant expected the sale to be made eventually. Agent Grills stated that the following morning, July 24, 1973, the informant called him and told him that he had received a telephone call from the defendant from Nashville, indicating that he had the cocaine with him; that Costanza had said that, if they wanted to buy, he would have it at the Carriage House Hotel about 8:30 p.m. on that date.

After this call on the morning of the 24th, Agent Leardis Rice, of the Baltimore office of the Drug Enforcement Administration, Agent Grills' superior, made a telephone call to Agent Tyrone Yarn, of the Nashville office, Agent Grills being also on the telephone line. At this time, all of the information above set forth was given to Special Agent Yarn.

Agent Yarn did not personally know Agent Rice, although he did know his name as an agent. The identity of the informant was not given to Agent Yarn, and he was not advised of the basis for the statement which had been made to him by Agent Rice that he was a reliable informant. Agent Yarn did not personally know the defendant, but was familiar with his name from the files of the agency.

The informant was known to both Agents Rice and Grills as reliable, having previously furnished them with information which proved to be accurate and having never furnished any information which proved to be inaccurate.

After receiving this information, Agent Yarn ascertained that the defendant did have a reservation on an American Airlines flight from Nashville to New York, scheduled for departure at 5:00 p.m., and also had a reservation at the Carriage House Hotel. Agent Yarn made some efforts to see the defendant so that he could identify

him, going to his place of employment, but was unable to see him on that day. He arranged, however, with ticket sellers of American at the airport, who knew the defendant, to point him out if he arrived that afternoon; however, the defendant did not so arrive.

Agent Yarn reported to Agent Rice that the defendant had not appeared and was informed that Agent Rice would check the matter out with the informant. At approximately 2:30 p.m. on the 25th, Agent Yarn received a telephone call from Agent Rice informing him that the informant had advised that the defendant had been delayed one day by some family matter but would make the trip on the afternoon of the 25th so that he would be at the Carriage House Hotel in New York by 8:30 p.m. Before this call, however, Agent Yarn had been successful in his efforts to identify him so that he could recognize him. After receipt of the new information, Agent Yarn ascertained that the defendant had a reservation, once more, on the same American flight.

Agent Yarn then conferred with his superior, Agent Klick, who had not been in Nashville the preceding day, and they went to the office of the United States Attorney to see about obtaining a warrant. They were advised by an Assistant United States Attorney that they did not need a warrant and that they would have probable cause to arrest without a warrant if the defendant appeared. Agent Yarn testified that he did not believe they had time to obtain a warrant.

In any event, the defendant arrived at the airport in a car at about 4:30 p.m., removed a suitcase from it, and walked over to the express check-in outside the front door of the airport, placed his suitcase on the pavement for checking by the Skycab, and, at this point, was arrested by Agent Klick, acting on signal from Agent Yarn that

the man with the suitcase was the defendant. Agent Klick immediately picked up the suitcase, and then, with the defendant in custody, they proceeded to a room in the airport building where the search was made.

The search of the defendant's person disclosed an amber bottle containing a white powder which gave a positive reaction, when field tested, for cocaine. The suitcase was locked but was unlocked by defendant, apparently under orders from the agents, and search therein revealed larger amounts of white powder, alleged to be cocaine, a total of slightly more than three pounds being seized.

ARGUMENT

I.

Whether Denying a Defendant the Right to Cross-Examine a Government Informer at a Pre-Trial Hearing Violates the Defendant's Right of Confrontation under the Sixth Amendment When the Informer Is the Sole Source Supporting the Government's Contention That Probable Cause Existed for the Arrest, Search and Seizure.

A second pre-trial hearing was held on February 8, 1974 to further determine whether sufficient probable cause existed for the arrest and search. At this hearing the trial judge refused to allow appellant his right to cross-examine the informer who was the sole source supporting the Government's contention that probable cause existed for the arrest. Appellant was thereby denied his Constitutional guarantee of the opportunity to confront witnesses against him, and can be protected now only by reversing his conviction.

During the February 8, 1974 hearing to further consider suppression of evidence, the Government sought to establish that probable cause existed for appellant's arrest. The only source of cause to arrest appellant was Bruce Winokour, the informer for the Government, who was first available to the Court at this hearing. Winokour was summoned before the Court by the trial judge, and was questioned by him in a manner sufficient to convince the judge that sufficient cause existed to retroactively validate the arrest, Winokour was then sent out of the courtroom, and appellant was denied an opportunity to question the informer despite his timely objections to do so. The judge then proceeded to determine that suppression of the evidence would not be allowed. (App. A-10)

The evidence was thus admitted at trial and formed the basis for appellant's conviction.

The right to cross-examine witnesses is an absolute right, and cannot lawfully be denied a criminal defendant. As the United States Supreme Court emphatically declared:

> "There are few subjects, perhaps, upon which this Court and other Courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the 14th Amendment's guarantee of due process of law." *Pointer* v. *Texas,* 380 U.S. 400, 405 (1964)

The Supreme Court indicated in a later case that an important objective of the right of confrontation is to guarantee that the fact finder has an adequate opportunity to assess the credibility of witnesses. *Berger* v. *California,* 393 U.S. 314 (1969). If this check on the credibility of witnesses is ignored, the semblance of fairness of the proceedings is lost, and the hearing becomes a mockery of justice.

It has been repeatedly held that this Sixth Amendment right of confrontation and Fourteenth Amendment guarantee of due process are not lost merely because the hearing is a preliminary one and not the trial itself. For example, the Third Circuit specifically stated that in a hearing to determine the issue of suppression of evidence to be used at trial pursuant to Federal Rules of Criminal Procedure, Rule 41(e), the right to cross-examine witnesses against the defendant exists. *United States* v. *White,* 446

F.2d 1280, 1282 (3rd Cir. 1971) The Sixth Circuit placed not only a right to cross-examine at a suppression hearing, but a consequence on the failure to do so. In *United States* v. *Thacker*, 382 F.2d 732 (6th Cir. 1967), a conviction was upheld despite the fact that an informer was unnamed during the suppression hearing. Defendant had an opportunity to cross-examine a government agent at the hearing, but failed to ask him about the informer's identification. The Court held that not only the right to confrontation existed at a suppression hearing, but that a duty to cross-examine government informers and agents existed then on a defendant, if these persons were present at court, or the defendant would be estopped from later asserting certain claims about their credibility and reliability. Ibid.

It is additionally significant to enforce constitutional safeguards at suppression hearings because of the consequences of the hearings in the ensuing trials. A denial of a motion to suppress becomes the basis for the law of the case for purposes of trial. Thus, the same rules of procedure governing fairness and due process at trial must also exist at suppression hearings. *Roberson* v. *United States*, 165 F.2d 752 (6th Cir. 1948); *see also, United States* v. *Montos*, 421 F.2d 215 (2d Cir. 1970); and *Rouse* v. *United States*, 359 F.2d 1014 (D.C. Cir. 1966).

There was ample basis for skepticism as to the legality of the procedure used by the Government, with a consequent necessity for a thorough confrontation of Government sources. As indicated, the trial judge summoned the informer, Bruce Winokour, and questioned him with questions which enabled Winokour to support the Government. The judge did not probe into the problem of the inconsistencies between his version and that of four other federal agents. Appellant further was denied the ability

to question Winokour about his past criminal record, the existence of a deal made with Government agents, or the fact that the informer was a narcotics user with a history of psychiatric treatment. As a result, the important objective of assessing the credibility of the informer as indicated in *Berger* v. *California*, supra, was completely ignored. The result is that appellant was denied his constitutional right of confrontation at a crucial point in the proceeding which allowed evidence to be entered at trial which was tainted by this illegality. Appellant was, therefore, irreparably harmed by this denial of constitutional rights, and the only just remedy is to reverse appellant's conviction.

II.

Whether the Failure to Suppress Testimony and Evidence Obtained by a Seizure of a Defendant's Suitcase Located Outside of His Immediate Control Followed by a Search Conducted After the Arresting Officers Had the Suitcase Firmly in Their Possession, Well Beyond the Immediate Control of the Defendant, Is Violative of a Permissible Search Incident to Arrest As Defined in Chimel v. California.

A second fatal defect requiring suppression of the seized cocaine and other evidence which is a product of the arrest and search of appellant was the failure of the arresting officers to secure a warrant to search appellant and his effects. Even if the arrest of appellant were considered legal, the ensuing search of appellant and his possessions was illegal, and any evidence obtained as a result of that search should have been suppressed by the trial judge.

Chimel v. *California*, 395 U.S. 752 (1969), is the leading authority on this subject. *Chimel* severely restricts

the use of warrantless searches, and places the burden on those seeking an exemption from the warrant requirement to show the need for searching without a warrant. *Id.* at 762. In order to qualify for a search incident to arrest, and thereby avoid the search warrant requirement, there must be a lawful arrest, and the arresting officers may only search and seize any evidence on the arrestee's person in order to prevent its concealment or destruction, and the area within his "immediate control" where an arrestee might obtain a weapon or possibly destroy evidence.

Numerous cases have applied the *Chimel* rule to fact situations, and several restrictions have resulted. Among those situations where a search was ruled illegal under the *Chimel* doctrine are: an arrest outside a garage, with the illegal search inside the garage after the arrests, *United States* v. *Garner,* 467 F.2d 205 (7th Cir. 1972); where police arrested a woman in her bedroom, entered a closed closet door in that room and found heroin, *United States* v. *Mapp,* 476 F.2d 67 (2d Cir. 1973) (ruled illegal because closed closet was not under her immediate control); and where three men were arrested in a parked car, which was later towed to a garage and searched by police, *Preston* v. *United States,* 376 U.S. 364 (1964) (incorporated into the *Chimel* decision, 395 U.S. at 763). In each case the area searched or the item seized was outside of the immediate control of the arrestee, and therefore was illegal if without a warrant, even though incident to an arrest.

The Fifth Circuit heard a fact situation very similar to the current one and found the search to be invalid. In *United States* v. *Jones,* 475 F.2d 723 (5th Cir. 1973), it was held that an F.B.I. search of a briefcase only one and one-half feet away from a handcuffed man could not be upheld in the light of the *Chimel* reasoning, and there-

fore would have been illegal if the arrested man had not consented to the search. As the Court indicated, the ability of a defendant to seize a weapon or destroy evidence is critical to a determination whether a search of objects close to his person is truly incident to arrest. *Ibid.* The same legal analysis is applicable to the present search, for appellant was not in possession of his briefcase containing the the cocaine when the search was made by the arresting agents. The briefcase was seized by the agents after appellant had given it to an airline employee for check-in. The arresting agents kept the briefcase in their possession while they led appellant to a private room, and only relinquished control over the case after ordering appellant to open it. Appellant at no time after arrest had any opportunity to seize the briefcase and thereby obtain any weapon or evidence from it. The briefcase was in fact locked, and there was no physical manner in which appellant could have seized the case from the arresting agents and withdraw any evidence. Clearly the briefcase was outside of appellant's immediate control, and *Chimel* v. *California* renders the search and seizure illegal.

The Order of the District Court for the Middle District of Tennessee of November 16, 1973, upheld the validity of the arrest and search of appellant's briefcase and was reinstated by order of the same Court on February 8, 1974. Judge Gray indicated that he did not agree with *United States* v. *Burch*, 471 F.2d 1314 (6th Cir. 1973), but that he was bound by that decision as to the validity of the search and seizure:

> "The subsequent warrantless search of the defendant's locked suitcase, already in the physical possession of agent Klick, presents, to the Court, a more serious problem. The court finds itself in agreement with the dissenting opinion of Judge Ely in *United States*

> v. *Mechiz*, 437 F.2d 145, 150-151 (9th Cir. 1971) wherein he pointed out that such searches are not truly analogous to that upheld in *Chambers* v. *Maroney*, 399 U.S. 42 (1970) and do not conform to the criteria set forth in *Chimel* v. *California*, 395 U.S. 752 (1969). However this Court is bound by the opinion of the Court of Appeals for Circuit in *Burch, supra*, holding without discussion, that a subsequent search of luggage following a lawful arrest was valid and therefore admissible." *Id.*

This reluctant deference to *Burch* requires analysis to reveal why *Burch* misstates the law and should not therefore be controlling here. *Burch* concluded that "the arrest being lawful, the search and seizure incident thereto was likewise valid." *Id.* at 1317. This conclusion is directly opposite from *Chimel*. The *Burch* court did not even note that *Chimel* existed, although it had been the law for two years. This Circuit did discuss the controlling status of *Chimel*, however, in cases decided more recently where it was recognized that the Court must look beyond the arrest, and determine as *Chimel* requires, whether the area searched was within the area from which a person might gain possession of a weapon or destructible evidence. *United States* v. *Shye*, 473 F.2d 1061 (6th Cir. 1973); *United States* v. *Becker*, 485 F.2d 51 (6th Cir. 1973); and *United States* v. *Mulligan*, 488 F.2d 732 (6th Cir. 1973). In each case determining the issue of the validity of a search incident to arrest since *Burch* the Sixth Circuit has ignored the conclusion that a valid arrest automatically means a valid search, and the Court has applied the *Chimel* reasoning. It is significant that at least as of May, 1974, *Burch* has not been cited as authority in any reported decision, and that in the three Sixth Circuit decisions regarding this issue since *Burch*, the *Chimel* reasoning has been followed, and the *Burch* reasoning rejected.

United States v. *Shye*, 473 F.2d 1061 (6th Cir. 1973), decided 11 days after *Burch*, is relevant to the issue of the validity of the search and seizure. In that case a sack of money was taken from behind a water heater in an apartment in which the defendant was arrested without a warrant. This seizure occurred after the defendant was arrested and under the control of the arresting agents. It was held that the area from which the sack was seized was outside the suspect's immediate control as defined in *Chimel*, and this holding was upheld, *Id.* at 1066, even though it was a couple of feet away from that defendant.

Similarly, the cocaine found in appellant's locked briefcase was outside of his control when seized. The briefcase was already surrendered to the airline at their check-in. Agents took control of the case at that point and never relinquished control over it until they forced appellant to unlock the bag in front of them in another room. There clearly was no danger of appellant's seizing a weapon from it or destroying evidence as it was locked and in the control of the agents, as was appellant. Once the luggage was in the possession of the arresting agents, they had every opportunity available to them to obtain a search warrant for the contents of the briefcase. The failure to secure a warrant even at this point was a continuing act evidencing the Government's complete disregard for procedural rules and Constitutional safeguards. Clearly this type of arrogant disrespect for the law is not what the *Chimel* justices had in mind when they spoke of the justifiable exception to the usual warrant requirement. Furthermore, the specific justifications for a *Chimel* search (protecting the arresting officers and preventing the destruction of evidence) are not present to support the search in the instant case, particularly where the appellant was handcuffed and considerably removed from the objects ultimately searched. Such searches violate not only the

letter of the law as expressed in *Chimel,* but also its spirit.

The only other legal reason for searching the briefcase would be by consent of appellant. In this situation, however, appellant at first refused to unlock his case, and did so only after the agents ordered him to. Such an act cannot be construed as a consent to search, for where there is coercion there cannot be consent. *Bumper* v. *North Carolina,* 391 U.S. 543 (1968).

The entire search and seizure was therefore illegal under *Chimel* and *Shye,* supra, and any evidence obtained therefrom should have been suppressed. The District Court Order upholding the validity of the search was clearly erroneous, and must therefore be reversed.

III.

Whether the Fourth Amendment Requirement of Probable Cause to Support a Warrantless Arrest Is Violated When the Sole Source for Such an Arrest Is an Informer's Tip That Is Totally Uncorroborated by Any Independent Surveillance Work Conducted by the Arresting Officers.

The initial contention on appeal is that any evidence or testimony obtained as a result of appellant's arrest should have been suppressed by the trial court as the product of an unlawful arrest. Because the arrest of appellant was without a warrant and was not based upon sufficient evidence to constitute probable cause, it did not satisfy constitutional requirements. Any evidence obtained as a product of this arrest, therefore, was tainted and should have been suppressed by the trial court. The failure to suppress deprived appellant of a lawful and fair trial and requires a reversal of this case.

The Fourth Amendment specifically demands that probable cause exist before an arrest or search may be properly obtained. There is a long-standing interpretation by the United States Supreme Court that this requirement of probable cause, whenever practical must be determined by a "neutral and detached magistrate, instead of being judged by an officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10 at 13, 14 (1948). See also, *McCroy* v. *Illinois,* 386 U.S. 300 (1967) and *Terry* v. *Ohio,* 392 U.S. 1 (1968). One reason for the preference for a determination of probable cause by neutral magistrate in the form of an arrest warrant is that the neutrality of the magistrate is preferred over the sometimes partial and competitive nature of the enforcement officer. Another factor was stated in *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964) as follows:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-fact justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

An evidentiary hearing was held on November 16, 1973, by Judge Gray to determine the lawfulness of the arrest, search and seizure of appellant and incriminating evidence used against him. It was alleged there by Agent Yarn of the Nashville office of the Drug Enforcement Administration, who arrested appellant on July 25, 1973, that he received information on July 24 from a Baltimore agent, which suggested that appellant might leave Nashville with some cocaine on that date. Appellant did not, in fact, leave on that date, but at approximately 2:30 p.m. on the 25th of July Agent Yarn received another

phone call from the Baltimore agent suggesting that appellant would instead leave that afternoon. Agent Yarn did not personally know the Baltimore agent, nor did he then learn the identity or reliability of the informer who had provided the Baltimore agent with the news. Despite this advance notice, Agent Yarn took it upon himself to forego the process of securing an arrest or search warrant after conferring with the prosecuting attorney in this case, and waited until he finally met appellant at the airport and arrested him. The arrest occurred as appellant arrived at the airport for a flight which Agent Yarn knew would not leave before 5:00 p.m.

There was, therefore, ample time for Agent Yarn to have secured an arrest or search warrant prior to the arrest. The rationale employed by the Assistant United States Attorney in avoiding the magistrate and two federal judges readily available must have been one of two alternatives: either he was aware of the insufficient probable cause upon which a warrant could issue, and would try to justify it with an after-the-fact determination, in which case the arrest would be illegal; or he made a determination of probable cause assuming the position of a neutral magistrate, which is clearly in violation of the Fourth Amendment and the authority cited.

A hearing was held by the trial court on November 16, 1973 resulting in the order overruling appellant's motion to suppress evidence and testimony resulting from his unlawful arrest. This order was later vacated, and then reinstated by an order of the same court on February 11, 1974. The order declared that the arrest was valid by virtue of the authority in *Beck* v. *Ohio,* 379 U.S. 89 (1964) and *United States* v. *Burch,* 471 F.2d 1314 (6th Cir. 1973). However, it can be shown that these cases do not call for a conclusion that the arrest was valid in this situation.

Beck v. *Ohio,* supra, involved the arrest of a man for possession of clearing house slips in violation of a state statute. However, that arrest was ruled unlawful and the evidence was suppressed because the arrest was made without a warrant, even though that defendant had a record of prior convictions for that particular crime. Indeed, the *Beck* court warned that: "[a]n arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Id.* at 96. The Supreme Court properly found that probable cause for arrest did not exist, and, therefore, the arrest and subsequent search were invalid. *Beck* can hardly be cited as a basis for the validity of appellant's arrest.

United States v. *Burch,* supra, upheld an arrest because of the circumstances there involved. The Court first held that ". . . where the initial impetus for an arrest is an unnamed informer's tip, the arresting officers must corroborate by independent investigation the information that the arrestees committed a felony or were in the process of committing a felony." *Id.* at 1317. The Court was able to find corroboration on the basis of six other factors: (1) knowledge that the defendant was involved in narcotics violations the previous year; (2) information from a concerted surveillance of the defendant corroborating the informant's description of the defendant's modus operandi; (3) that the informer had purchased narcotics from the defendant on previous occasions; (4) that the arresting agent had a report from an informant elsewhere that defendant was known to deliver drugs to several United States cities; (5) that the arresting officers made observations immediately prior to the arrest; and

(6) the general knowledge of the agents as to persons dealing in illegal drugs. None of these factors exist as to appellant, and the cases can be easily distinguished as a result. Appellant had no previous arrests or convictions in narcotics, and the arresting agents professed no knowledge as to any dealings of appellant with narcotics. Agents had done no surveillance work on appellant to corroborate the informer's tip, and the informer did not allege that he had ever dealt with appellant before. The two fact situations are inherently different and require different treatment.

Appellant, therefore, contends that his warrantless arrest was unconstitutional and that any evidence related thereto is tainted and must be excluded. A contrary decision would only serve to bypass the safeguards of the warrant procedure and condone and encourage the very "after-the-fact justification" which the Supreme Court has declared illegal.

IV.

Whether a Defendant's Constitutional Right to a Fair Trial Before an Impartial Judge Is Violated When the Trial Judge Makes Continuous Interruptions, Comments, and Gestures in the Presence of the Jury to the Severe Prejudice of the Defendant.

The mandate of the Fifth and Fourteenth Amendments of due process necessarily requires that the trial judge in a jury trial conduct himself in such a manner as to appear totally impartial. When a judge begins to question witnesses and make gestures so that he is, in fact, assuming an advocate's position, the jury is influenced so extensively that the guilt-determination process is impaired and a defendant is deprived of a fair hearing. This right is not subject to compromise and is not diminished by the weight

of the evidence against a defendant. Essential to the conduct of a fair and impartial trial is the complete neutrality of the presiding judge. Such a requirement is particularly acute where the case involved highly sensitive charges, as for example, drug charges. Courts have frequently recognized the fact that jurors look to a judge for guidance and place great reliance on his remarks, comments, and gestures. In describing the unique position a judge commands, one judge stated as follows:

> The trial judge occupies a high position. He presides over the trial. The jury has great respect for him. They can be easily influenced by the slightest suggestion coming from the court, whether it be a nod of the head, a smile, a frown, or a spoken word. It is, therefore, imperative that the trial judge shall conduct himself with the utmost caution in order that the unusual power he possesses shall not be abused.
>
> Jochems, J., in *State* v. *Wheat*, 131 Kan. 562, 292 P. 793 (1930) (in dissenting opinion).

The Supreme Court also recognized the pivotal role which a judge assumes in a trial when in *Quercia* v. *United States*, 289 U.S. 466 (1933), it summarized the duties and restrictions on a trial judge in a case that it reversed because the judge had become too much of an adversary.

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. . . . The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling. This court has accordingly

> emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided' . . ." *Id.* at 470.

As the Court stated, the trial judge's behavior must not preclude "that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury." *Offutt* v. *United States,* 348 U.S. 11, 17 (1954). Judicial remarks or actions made in the presence of the jury are subject to special scrutiny because of the recognized fact that "the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Stan* v. *United States,* 153 U.S. 614, 626 (1894); *Bollenbach* v. *United States,* 326 U.S. 607, 612 (1946); *Moody* v. *United States,* 377 F.2d 175, 180 (5th Cir. 1967). The judge must take particular care that the respect which his office engenders does not tend to persuade or lure a jury to defer to his stated opinions. Therefore, while a judge is not an automaton, he must exercise considerable due care to avoid communicating to the jury prejudicial partisanship.

In the present situation, the trial judge went far beyond the "lightest word or intimation" that the Supreme Court was concerned with to the severe prejudice of the defendant. There was a total of approximately 120 instances during the course of the week-long trial in which the trial judge interrupted the course of the proceedings to ask questions or make comments in front of the jury. It is to be admitted that the majority of these interruptions was not prejudicial and that in fact many were necessary to allow the judge to perform his role. However, many instances so prejudiced the appellant that they may

not be condoned as a necessary or proper exercise of his position. Some of the more serious occasions are set out below.

The first serious instance of bias occurred while the jury was out of the courtroom, but it is important in that it established the tone for later questions and comments from the bench. The defense attorney had requested the court make allowance for the use of a character witness before appellant testified because of the fact the witness had to fly in from South Carolina and had to be in New York by 7:00 p.m. Judge Gray denied the request and replied: "Mr. Quillen, I could possibly worry about that if I took more time. Get the jury in here." The trial judge repeated his feelings about the use of the witness, the president of Jonathan Logan, Inc. ". . . I don't want to hear any more about how important that man is or how he has to get somewhere. He can go somewhere right now as far as I am concerned or testify." After Mr. Shwartz had testified as to appellant's good reputation and his excellent work with the customers appellant deals with in New York and the Southeastern United States, the Government decided not to cross-examine. However, at this point, the trial judge interrupted with the following damaging comment question:

> "Mr. Shwartz, is it part of his reputation as known by you that he has for a number of years been buying cocaine at $700 a half ounce and $1,000 an ounce four to six times a year and use it personally?"

The inflammatory nature of this question, which assumes a fact yet to be proven to the jury, unquestionably voided this person's effect as a character witness. The effect is even more significant in this situation where appellant's reputation is an important element in his defense of entrapment so as to help negate any prior crim-

inal design or intent. This comment by a federal judge is inexcusable, and clearly put the court on the side of the prosecution.

It is significant that even if the above question were posed by the Government it would be prejudicial for the above reasons. In addition, it is crucial that the form of the question is improper in that it sought to obtain a personal observation of the witness apart from the general reputation of appellant in the community. As the Supreme Court emphatically declared in *Michelson* v. *United States*, 335 U.S. 469, 482 (1948):

> "Since the whole inquiry, as we have pointed out, is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed."

The whole nature of this incident exemplifies perhaps the grossest form of judicial misconduct, and unfortunately appellant was the unwilling victim. It should be noted in addition that appellant's attorney objected to the question, but that the court refused to instruct the jury to disregard the dialogue.

Further examples of comments which had the effect of placing the court on the side of the Government followed. The judge at one point led the witness, Winokour, in his question so as to help him explain that he didn't consider himself a government informer while in Atlanta in 1970. This was significant since Winokour's reliability as an informer was questioned in the suppression hearing during which appellant was not allowed to cross-examine. Winokour had denied under oath that he was an informer during the time indicated, when in fact

he was supplying information to the Government. The court in effect put words into his mouth with its question, enabling him to try to explain the apparent contradiction.

Shortly thereafter, Judge Gray interrupted appellant's examination to ask extensive questions through almost four pages of transcript. The responses evoked from these questions tended to rebut appellant's defense of entrapment. After a brief repose, the trial judge again interrupted appellant and posed another page of transcript's worth of questions. The net effect was to eliminate appellant's right to effectively confront Winokour, the only Government witness who could offer evidence contrary to appellant's theory of entrapment. At this point appellant not only objected, but moved for a mistrial on the ground that the actions of the trial judge in their entirety were depriving appellant of a fair trial. This motion was denied.

The trial judge later made comments which tended to minimize the effectiveness of another character witness, Nile Yearwood. Judge Gray at first stated: "Can you qualify him, Mr. Quillen? Apparently not. Go ahead." Despite this statement, the witness qualified himself by the court's questioning as knowing appellant's general reputation in the community after having talked with a lot of people about appellant.

The trial judge examined the recollection of Winokour, again interrupting appellant's reexamination. The Court tested Winokour's recollection of the lack of furniture in appellant's townhouse, which was a reason given by appellant for making a trip to Columbia to purchase more furniture. The effect of the interruption was again to minimize the effectiveness of appellant's right of confrontation of the Government's key witness in rebuting the entrapment defense.

The Court again intervened when appellant was attempting to pursue its constitutional right of confrontation. Appellant, while probing into inconsistencies of a Government rebuttal witness's statements, was stopped by the trial judge and was requested to read Grand Jury testimony when appellant did not wish to do so. Appellant indicated to the Court that he had intended to get the witness to declare himself on a prior statement to the Grand Jury; and that he had other witnesses to impeach him if he denied it. Appellant then respectfully moved the court to declare a mistrial, which was denied, and to instruct the jury to disregard the comments of the court when it instructed appellant how to run his case and this also was denied.

The Court again assumed the role of the Government, although out of the hearing of the jury, when it suggested that the Government call a certain witness after the prosecutor had indicated he would not do so.

The Court's remark concerning delays in the trial directed at the defense certainly influenced the jury. After having served for a number of days, the jury would be susceptible to a charge that one of the parties was responsible for their delay in returning home.

The trial judge again recommended that the defense pursue a subject that it did not wish to pursue. This put appellant in an unfavorable light when the subject was not in fact pursued, thereby prejudicing the appellant.

The Sixth Circuit Court of Appeals, in its review of the trial judge's conduct, dismissed his improprieties by stating:

> From our examination of the record, we find that the trial judge committed no reversible error in his conduct of the trial and that, in any event, any alleged

error, in view of the overwhelming evidence against the appellant, was not prejudicial "beyond a reasonable doubt."

In support of its ruling, the Court cited *Chapman* v. *California,* 386 U.S. 18 (1967).

In *Chapman,* however, this Court explicitly stated that a standard for judging harmless error which placed primary emphasis upon the "presence of other substantive evidence that proof of guilt was overwhelming" was misguided at best. 386 U.S. at 23. Instead, the *Chapman* Court stated that the applicable standard was one which it had originally announced in *Fahy* v. *Connecticut,* 375 U.S. 85 (1963), wherein it said that the primary concern was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87. If it did, reversal was required. One need not show, therefore, that the judge's conduct *was* the cause of conviction, but only that it reasonably *might* have been *one* of the factors which led to conviction.

The totality of the statements by the trial judge served to influence the jury to such a degree that the appellant was severely prejudiced. It is evident that application of the *Fahy-Chapman* standard to the trial judge's prejudicial conduct demands reversal, or in the alternative, a new trial.

V.

Whether Denying a Request for a Special Cautionary Instruction Concerning the Reliability of Uncorroborated Testimony Given by a Paid Government Informer Where That Testimony Is the Primary Basis upon Which a Conviction Is Based, Deprives a Defendant of His Right to a Fair Trial.

A most serious error was committed by the trial court in delivering its jury instruction when it omitted a cautionary instruction with respect to the testimony of Bruce Winokour, the Government informer. In failing to give this instruction and in denying appellant's special request #5 for such a warning, the court committed prejudicial error which denied appellant his right to a fair trial.

The Sixth Circuit in *United States* v. *Griffen,* 382 F.2d 823 (6th Cir. 1967) reversed the conviction of an appellant convicted for selling heroin to a government informer who was an addict and whose testimony was only lightly corroborated, where the trial judge failed to give a cautionary instruction. Although the informer in that fact situation was also an addict, the court did have some general rules for jury instructions when a government informer is involved.

"Thus, if the incriminating testimony of an informer is uncorroborated or unsubstantial, special cautionary instructions are surely required. If such testimony of an informer is corroborated in critical respects, we nevertheless favor careful instructions in form and substance calculated to call attention to the character of the testimony of the informer, leaving to the jury the ultimate question of value and credibility. The sufficiency of the instructions depends upon other incriminating circumstances of the case tending to corroborate the informer." *Id.* at 828, adopt-

ing as law the rule set out in *Todd* v. *United States,* 345 F.2d 299 (10th Cir. 1965). The Court concluded that such an omission requires a reversal and a new trial even though a conviction might have resulted even with a cautionary instruction, since this probability is not the criteria for reversal. *Id.* at 829; *Kotteakos* v. *United States,* 328 U.S. 750, 776 (1946).

Several other circuits have adopted this rule specifically. In addition to the Sixth and the Tenth Circuits, the D.C. Circuit in *Fletcher* v. *United States,* 158 F.2d 321 (D.C. Cir. 1946) held that the jury should be instructed to closely scrutinize the credibility of the testimony of a paid informer for the purpose of determining whether it is colored in such a way as to place guilt on the defendant in furtherance of the witness's own interest. Three other circuit courts have specifically adopted *Fletcher* as the law in their jurisdictions. *United States* v. *Masino,* 275 F.2d 129, 133 (2d Cir. 1960); *Joseph* v. *United States,* 286 F.2d 468, 469 (5th Cir. 1960); and *Orebo* v. *United States,* 293 F.2d 747, 750 (9th Cir. 1961). In addition, the First Circuit adopted the same reasoning regarding another type of witness with a strong motivation to lie, the accomplice. *McMillen* v. *United States,* 386 F.2d 29, cert. den. 390 U.S. 1031 (1967).

The rationale for this rule on cautionary instructions is based on the fact that informers, especially when compensated for their efforts, have a motive to lie. It is this danger that creates a necessity for special instructions on the questionable reliability of informers.

In the present fact situation, appellant admitted possessing cocaine at the time of his arrest, which he bought for Mr. Winokour. Appellant's defense was that of entrapment: That Bruce Winokour induced appellant to illegally purchase cocaine for Mr. Winokour's benefit. Up-

on this issue the only evidence was the testimony of the appellant, Winokour and Nancy Jenkins. The other witness present at the meetings between Winokour and appellant, Mr. Modell, was under indictment and was therefore unwilling to testify.

Appellant testified that Winokour initiated the meeting between the two in New York City by phoning twice and then actually coming over to appellant's hotel room. Indeed it would be strange for Winokour to come all the way over to appellant's room in New York from his house in Maryland if he were not initiating the transaction. Winokour was an acquaintance of appellant's whom he had met in Miami and again in New York on earlier occasions. Appellant testified that he never offered to sell any cocaine, but that Winokour told him he was looking for some cocaine and inquired to determine if appellant knew any sources. Appellant denied knowing any sources, and when Winokour offered him a motorcycle if appellant would name any sources, appellant again replied in the negative. When Winokour tried a third time with a large financial reward offer, appellant finally relented and made some calls to try to locate some sources. Appellant finally succeeded in obtaining some cocaine for Winokour, and it was this cocaine that appellant had in his possession when arrested. Appellant later told Winokour by phone that he would return the cocaine to a "Michael" if Winokour did not buy it, since he was only trying to help Winokour. Furthermore, appellant testified that he had not even paid the supplier for the cocaine, since appellant intended to return it if Winokour subsequently refused to conclude the transaction.

It was therefore appellant's contention that it was the use of a trusted acquaintance who initiated a meeting and conversation about purchasing cocaine, and made re-

peated pleas to appellant, which induced him to make a connection to furnish Winokour with some cocaine. Mr. Winokour admitted going to appellant's hotel room with the intention of making a connection for his companion, Mr. Modell, but that he did not personally offer to buy any cocaine, and that Modell did. Winokour additionally claimed that appellant first called him in offering to sell cocaine to him. However, it should be noted that even if Winokour were believed, he testified that he personally gave Modell $5,000 with which to buy cocaine, and accompanied him to appellant's room in New York to act as an "intermediate" to get appellant to sell cocaine to Modell. Winokour therefore admits he provided the monetary needs and a buyer to induce appellant to sell cocaine to another. Thus the issue of whether Winokour personally induced appellant to sell him cocaine, or whether he got Modell to do the inducing, is immaterial, since a case of entrapment can be made out either way.

Winokour further testified that appellant had the cocaine in plain view on a desk in his room in New York, ready to sell. This was directly refuted not only by appellant, but also by Nancy Jenkins, who was present. She testified that there were no packages of white powder on a table in appellant's hotel room, in accord with appellant's testimony and rebutting Winokour's story that appellant had cocaine in plain view ready to sell. She did not, however, overhear the conversation between appellant and Winokour regarding the drug transaction, and could not testify as to that. Additionally, Winokour claimed that appellant informed him that appellant had a kilo of cocaine ready to sell in his room, yet Winokour admitted that appellant had to make some phone calls after their conversation during which appellant was haggling over a price. The inconsistencies in Winokour's testimony sup-

port the need for a special cautionary instruction with regard to the credibility of his statements.

Winokour admitted that he was being compensated by the Government for his efforts in securing information about appellant. He was thus a paid Government informer for the Government, and fits the category of persons which the Sixth Circuit says warrants a special cautionary instruction. In addition, Winokour is an admitted user of narcotics, and has been arrested and convicted previously for a violation of the marijuana tax act as a reduced charge after testifying for the Government in a case which resulted in an acquittal. He also furnished the Government with information on other occasions. He had also been convicted of burglary and shoplifting. These last two factors increase the necessity for a cautionary instruction in this situation.

As to the issue of whether Winokour implanted the criminal design in appellant's mind, it has already been indicated that appellant testified that he was approached by Winokour, and that he was asked more than one time if he would make a connection to get Winokour the cocaine before he succumbed. Appellant had never been in trouble with the law on any drug related charges before, and in fact had no previous convictions. He testified that he had never before sold any drugs to anyone. Appellant adequately established a lack of criminal attitude prior to his arrest.

The only government witnesses who testified to the contrary were Patricia Sperenzella, who pleaded guilty to reduced charges prior to testifying in this case, and her "roommate" but unmarried companion, Stephen Sperenzella, who was led to believe he would get a reduced sentence to a drug distribution charge if he testified in this case. Thus a special cautionary instruction was

necessary with respect to their testimony. This is further necessitated by the admission by Patricia that she had already committed perjury once in this case, and that Stephen admitted first that he also had given contradictory statements to agents and second that anything "truthful" he said in Court now would not be used again him.

The net effect is that these three persons, Winokour with respect to the entrapment itself and the Sperenzellas with respect to the appellant's character, were the only persons offering evidence contrary to the entrapment defense established by appellant, and all three had adequate motive to lie. A cautionary jury instruction was absolutely essential then to preserve a semblance of a fair and just trial.

To counter this, appellant called several witnesses to testify as to his good character. They included Richard Shwartz, president of Jonathan Logan, Inc. and Nile Yearwood, retired president of Capitol City Bank in Nashville who had known appellant for 14 years.

The second serious error in the court's jury instruction was the prejudicial instruction regarding motive or bias on the part of witnesses. The trial court singled out defense witnesses Nancy Jenkins and Charles Kramer as deserving a special cautionary instruction as a result of their being named as co-defendants with appellant in another trial. The trial court properly instructed the jury that they could not consider these indictments as proof of their guilt, nor can they be used to impeach these two witnesses. However, the court did state that these indictments can be considered for the purpose of determining the motive or bias of these two as witnesses in this case.

Although requested to do so, the trial court refused to administer a similar cautionary instruction with respect

to other witnesses who were called by the Government and were similarly indicted or had a special motive or propensity to lie. Appellant sought a cautionary instruction for perjurers in instruction request #2, since Government witness Patricia Sperenzella admitted having lied under oath. The trial court completely refused to instruct on this matter. Appellant in special request #3 sought a cautionary warning regarding the impeachment of witnesses because of prior inconsistent actions, or convictions, or a general bad reputation. This request referred to Patricia and Stephen Sperenzella, both of whom were convicted prior to testifying for drug law violations. As already indicated, Patricia had pled guilty to a reduced charge prior to testifying in this case for the Government while Stephen pleaded guilty in hopes of getting a reduced sentence for testifying in this case after having given contradictory statements to agents.

A third Government witness, Mr. Winokour, also had previous convictions to his discredit and had charges dropped in exchange for testifying in this case.

The trial court refused to give these specific instructions, and only gave a short general charge without mentioning names that the jury could consider prior convictions relevant if it wanted to. The court failed to charge that these convictions and reduced charges could be a source of motivation for the testimony of these Government witnesses, whereas the court had so instructed after specifically referring to the two defense witnesses.

The discriminatory nature of the charge gave the Government a significant advantage in its prosecution. This factor alone would have been sufficient to deprive appellant of a fair trial, since the jury received a distorted and severely prejudicial instruction on the law.

The third error in the substance of the instruction to the jury at trial was the failure of the court to instruct the jury that with respect to the defense of entrapment, that Bruce Winokour was an agent of the Government. As previously stated, Mr. Winokour by his own admission was working with the Government officers in the investigation of this case, and was compensated for his efforts in this direction. The Government cannot make use of an informer, even though he remains unpaid, without that informer becoming an agent of the Government for that purpose. *Sherman* v. *United States*, 356 U.S. 369, 375 (1957). There an informer can be a sufficient link with the Government to create an illegal entrapment situation if that informer improperly induced the defendant into committing the illegal act. *Id.*

The trial court's instruction regarding the defense of entrapment referred only to Government officers or agents without explaining just what constitutes a Government agent. Appellant's special instruction request #6 specifically referred to Winokour as a Government informer, and would have instructed the jury that he, as an agent of the Government, could trigger an entrapment defense if he improperly induced appellant to commit the crime charged.

The result of the jury charge was to leave the jury ignorant as to who qualified as a Government agent, and uninstructed on how to determine if Winokour was one. The effect was to deprive appellant of his right to put his defense of entrapment adequately to the jury, and thus deprive him of a fair trial.

Any one of these three errors in the substance of the jury instructions alone could be sufficient to create a situation where the appellant was deprived of his right to a fair hearing. This circuit has emphatically stated

that a cautionary instruction is absolutely essential where a paid informer's testimony is used to prosecute a person, especially where as here the informer's testimony is completely uncorroborated, he has had several charges against him reduced by the Government prior to trial, and he is a previous felon and admitted narcotics user. This situation combined with the discriminatory charge by the trial judge casting suspicion on defense witnesses but not at prosecution witnesses, and the confusing charge regarding Government agents, created an extremely prejudicial statement of the law cast in favor of the Government. There was no way a well intentioned lay jury could overcome this discriminatory instruction of the law by the trial judge. Appellant was effectively denied a fair trial and the only proper remedy is for a new trial to be granted.

The trial court erred further in refusing to deliver a jury instruction with respect to the effect of testimony by witnesses as to the good character of the appellant. Appellant in his special request no. 4 sought to have the jury instructed that testimony of appellant's good character should be considered along with other evidence in the case.

Character testimony is a vital part of the relevant proof used to establish guilt or innocence in a criminal trial. The Supreme Court has recognized the importance of character evidence for a long time.

> ". . . the decided weight of authority now is that good character, when considered with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it, the other evidence would be convincing." *Edgington* v. *United States*, 164 U.S. 361, 366 (1896)

This circuit has also had occasion to comment on the relevance of good character evidence. *Gariepy* v. *United States,* 220 F.2d 252, 261 (6th Cir. 1955), cert. den. 350 U.S. 825, interpreted the effect of *Edgington* as requiring a court instruction on the use of character evidence not only when the weight of the evidence is evenly balanced between guilt and innocence, but requiring an instruction in every case. See also, *Poliafico* v. *United States,* 237 F.2d 97 (6th Cir. 1956), cert. den. 352 U.S. 1025, reh. den. 353 U.S. 93.

A trial judge has a duty of instructing a jury on all points of law relevant to the issues developed in the trial. If he fails to do so, or instructs improperly, the only way the error can be rectified is to grant a new trial if the effect was to prejudice the convicted appellant. *Edgington* v. *United States,* 164 U.S. 361 (1896)

In this case, the character of appellant was a vital issue. Since appellant relied on a defense of entrapment, it was essential that he preserve his good reputation in defending against the prosecutor's attempt to show appellant's predisposition to commit the crime charged. Appellant called the President of Jonathan Logan, Inc. and the retired President of Capitol City Bank, among others, to support his claim of good character. It was essential to appellant's defense that he be permitted to submit this evidence before the jury and that the jury be instructed as to the weight of such testimony and its purpose.

The failure of the trial judge to instruct on the use of character evidence constituted prejudicial error. This omission, when considered as part of the totality of the circumstances created by other omissions and discriminatory statements which were part of the jury instruction, deprived appellant of his right to a fair and proper hearing. The only proper remedy is to grant appellant a new trial.

VI.

Whether It Is Improper for Impeachment Purposes, for the Prosecution to Ask Several Defense Witnesses If They Were Indicted Along with a Defendant in a Totally Independent and Unrelated Proceeding Where No Convictions Have Resulted.

The trial court created reversible error in permitting the Government to pursue the existence of indictments for several defense witnesses and appellant for the purpose of impeachment. The introduction of this evidence so prejudiced appellant in the eyes of the jury that he was denied any trace of fairness in his hearing. Justice could only be restored by granting appellant a new trial.

The Government improperly inquired in cross-examination whether Nancy Jenkins, Charles Kramer, defense witnesses, and appellant had been indicted in another district. Appellant objected on each occasion but was overruled by the trial court. The insinuations referred to mere indictments in unrelated facts situations, for which trial had not yet been held. This pursuance of the existence of the indictments themselves, and not the truth of the matter contained therein was improper. No convictions have arisen from these indictments, so they are improper for impeachment purposes. The only purpose the Government could have in asking these questions was to cast doubt on the credibility of these witnesses and the appellant, and they certainly did succeed.

The basic rule established by this court, as stated in *United States* v. *Fisher*, 377 F.2d 285, 286 (6th Cir. 1967), is that: "[t]he introduction in a criminal case of testimony concerning unrelated criminal activities of a defendant is so likely to have a prejudicial effect on the jury that it is generally held to be inadmissible, . . ."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN

CERTIFICATE OF SERVICE

I hereby certify that I did this 5th day of February, 1975 mail a copy of the foregoing Petition for Writ of Certiorari to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

DALE QUILLEN

APPENDIX

No. 74-1620

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES VICTOR COSTANZA,
Defendant-Appellant.

ORDER

(Filed December 11, 1974)

Before: PHILLIPS, Chief Judge, MILLER, Circuit Judge, and DEMASCIO,* District Judge.

The appellant was convicted on a one-count indictment for violation of 841(a)(1) of Title 21 U.S.C. in that he allegedly knowingly, and intentionally possessed with intent to distribute, a quantity of cocaine, a controlled substance.

On appeal, the appellant contends that the district court erred (1) in overruling motions to suppress testimony allegedly obtained as a result of an unlawful arrest and an unlawful search and seizure; (2) in conducting a sup-

*The Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, sitting by designation.

pression hearing by calling the informant as the court's own witness and denying the appellant, as well as the government, the right to cross-examine the witness; (3) in denying certain special requests for instructions to the jury; (4) in allowing the prosecution to ask several defense witnesses if they were indicted with appellant in a case in New York; and finally, in continuously interrupting the trial and making comments and gestures which were prejudicial to the appellant and caused him to be denied a fair trial.

Narcotics agents had prior information that the appellant had engaged in dealing in narcotics and they received a tip from an informant that he would arrive at the Nashville airport at a given time on a certain date. The agents proceeded to the airport and found that the information given to them by the informant was confirmed by their own observations. They proceeded to arrest the appellant and to seize and search his luggage which was nearby. The search disclosed in the luggage a pair of balance scales, a large quantity of cocaine, and a box of plastic baggies. A search of the appellant's person also disclosed an amber bottle containing cocaine.

We have carefully considered all of the errors assigned for reversal of the judgments of conviction and we find them to be without merit. The agents, on the basis of the informant's tip and their own observations at the airport, had probable cause to arrest the appellant and to search the luggage which was located in close proximity of his person, and then to effect a seizure of the incriminating contents. *See Draper* v. *United States,* 358 U.S. 307 (1959); *Chimel* v. *California,* 395 U.S. 752 (1959); and *United States* v. *Burch,* 471 F.2d 1314 (6th Cir. 1973).

While the right of cross-examination of witnesses is scrupulously protected by the courts, it is subject to limita-

tions within the sound discretion of the trial judge. In the present case, the trial judge made the informant his own witness in order to make inquiry only with respect to whether or not wiretaps furnished any of the probable cause information upon which the agents relied in arresting the defendant. The question raised by the motion to suppress the evidence had been inquired into at a prior hearing; and at the trial of the case itself on its merits, the appellant's attorney was given free rein to cross-examine the informant even though he had made him his own witness. We think that the district judge acted reasonably and within the permissible bounds of his discretion in thus limiting the right of cross-examination at one of the suppression hearings.

Errors are assigned because of the alleged conduct of the trial judge in interrupting the trial to pose questions to various witnesses and in making certain comments. From our examination of the record, we find that the trial judge committed no reversible error in his conduct of the trial and that, in any event, any alleged error, in view of the overwhelming evidence against the appellant, was not prejudicial "beyond a reasonable doubt." *See Chapman* v. *California*, 386 U.S. 18 (1967), and Fed. Rule Crim. Proc. 52(a). All other errors assigned for reversal have been carefully weighed and considered by the Court and have been found to be lacking in merit.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

ORDER

(Filed November 26, 1973)

The indictment in this case charges the defendant with the possession with intent to distribute a quantity of cocaine, a violation of 21 U.S.C. § 841(a)(1). The case is before the court on the defendant's motion to suppress all testimony pertaining to a quantity of cocaine seized from defendant's person and from a suitcase seized after his arrest on July 25, 1973. The motion was subsequently orally amended (the oral amendment being later reduced to writing) to ask the return to defendant of all non-contraband property seized from defendant on the day of his arrest. Another phase of the supplemental motion is discussed hereinafter.

The ground for the motion is the allegation that the arrest of the defendant was unlawful and that the subsequent search of his person, personal effects and luggage was likewise unlawful, the arrest, search and seizure being warrantless.

A preliminary hearing was had before the Honorable L. Clure Morton, Judge of this District Court, on July 30, 1973, an indictment was returned August 23, 1973, the defendant pleaded not guilty at arraignment September 18, 1973, filed his motion to suppress within the time allowed, and an evidentiary hearing was had on the motion November 16, 1973. From the two hearings the following facts appear.

On July 23, 1973, Agent Joe Grills, of the Baltimore office of the Drug Enforcement Administration, received a telephone call from an informant. The informant told him that he had been in New York and had seen a sample of cocaine in the possession of the defendant Costanza

and that Costanza had tried to sell a kilo of cocaine to him and another individual for Thirty-seven Thousand Dollars ($37,000). He stated that they had told Costanza that the price was too high and that Costanza had placed the cocaine in his suitcase, these events having occurred at the Carriage House Hotel in New York. The informant advised the agent that he thought the defendant had gone to Nashville and that he was of the opinion that the defendant expected the sale to be made eventually. Agent Grills stated that the following morning, July 24, 1973, the informant called him and told him that he had received a telephone call from the defendant from Nashville, indicating that he had the cocaine with him; that Costanza had said that, if they wanted to buy, he would have it at the Carriage House Hotel about 8:30 p.m. on that date.

After this call on the morning of the 24th, Agent Leardis Rice, of the Baltimore office of the Drug Enforcement Administration, Agent Grills' superior, made a telephone call to Agent Tyrone Yarn, of the Nashville office, Agent Grills being also on the telephone line. At this time, all of the information above set forth was given to Special Agent Yarn.

Agent Yarn did not personally know Agent Rice, although he did know his name as an agent. The identity of the informant was not given to Agent Yarn, and he was not advised of the basis for the statement which had been made to him by Agent Rice that he was a reliable informant. Agent Yarn did not personally know the defendant, but was familiar with his name from the files of the agency.

The informant was known to both Agents Rice and Grills as reliable, having previously furnished them with information which proved to be accurate and having never furnished any information which proved to be inaccurate.

After receiving this information, Agent Yarn ascertained that the defendant did have a reservation on an American Airlines flight from Nashville to New York, scheduled for departure at 5:00 p.m., and also had a reservation at the Carriage House Hotel. Agent Yarn made some efforts to see the defendant so that he could identify him, going to his place of employment, but was unable to see him on that day. He arranged, however, with ticket sellers of American at the airport, who knew the defendant, to point him out if he arrived that afternoon; however, the defendant did not so arrive.

Agent Yarn reported to Agent Rice that the defendant had not appeared and was informed that Agent Rice would check the matter out with the informant. At approximately 2:30 p.m. on the 25th, Agent Yarn received a telephone call from Agent Rice informing him that the informant had advised that the defendant had been delayed one day by some family matter but would make the trip on the afternoon of the 25th so that he would be at the Carriage House Hotel in New York by 8:30 p.m. Before this call, however, Agent Yarn had been successful in his efforts to identify him so that he could recognize him. After receipt of the new information, Agent Yarn ascertained that the defendant had a reservation, once more, on the same American flight.

Agent Yarn then conferred with his superior, Agent Klick, who had not been in Nashville the preceding day, and they went to the office of the United States Attorney to see about obtaining a warrant. They were advised by an Assistant United States Attorney that they did not need a warrant and that they would have probable cause to arrest without a warrant if the defendant appeared. Agent Yarn testified that he did not believe they had time to obtain a warrant.

In any event, the defendant arrived at the airport in a car at about 4:30 p.m., removed a suitcase from it, and walked over to the express check-in outside the front door of the airport, placed his suitcase on the pavement for checking by the Skycap, and, at this point, was arrested by Agent Klick, acting on signal from Agent Yarn that the man with the suitcase was the defendant. Agent Klick immediately picked up the suitcase, and then, with the defendant in custody, they proceeded to a room in the airport building where the search was made.

The search of the defendant's person disclosed an amber bottle containing a white powder which gave a positive reaction, when field tested, for cocaine. The suitcase was locked but was unlocked by defendant, apparently under orders from the agents, and search therein revealed larger amounts of white powder, alleged to be cocaine, a total of slightly more than three pounds being seized.

Two questions are presented by these facts: (1) was the warrantless arrest lawful, and (2) if lawful, was the subsequent search of the suitcase also lawful?

From the facts heretofore summarized, the court holds that the information in the possession of Agents Yarn and Klick, partly corroborated by their previous investigation and further corroborated by the defendant's alighting from his car with a suitcase and preceding to the American Airlines check-in station, gave them, at that time, probable cause to believe that the defendant "had committed or was committing" an offense and that, therefore, his arrest was lawful. *Beck* v. *Ohio*, 379 U.S. 89 (1964); *United States* v. *Burch*, 471 F.2d 1314 (6th Cir. 1973). *See*, also, *United States* v. *Romero*, 249 F.2d 371, 374 (2d Cir. 1957).

The subsequent warrantless search of the defendant's locked suitcase, already in the physical possession of Agent

Klick, presents, to this court, a more serious problem. The court finds itself in agreement with the dissenting opinion of Judge Ely in *United States* v. *Mehciz,* 437 F.2d 145, 150-151 (9th Cir. 1971), wherein he pointed out that such searches are not truly analogous to that upheld in *Chambers* v. *Maroney,* 399 U.S. 42 (1970) and do not conform to the criteria set forth in *Chimel* v. *California,* 395 U.S. 752 (1969). However, this court is bound by the opinion of the Court of Appeals for this Circuit in *Burch, supra,* holding, without discussion, that a subsequent search of luggage following a lawful arrest was valid and therefore admissible.

The argument that the search was in some manner invalidated by removing the defendant and the suitcase to a room at the airport before conducting it is without merit. *United States ex rel. Muhammad* v. *Mancusi,* 432 F.2d 1046 (2d Cir. 1970).

Accordingly, the motion to suppress evidence of the items seized, either from the person of the defendant or from his luggage, is DENIED.

In the supplemental motion of defendant, adverted to *supra,* the court was asked to order the United States Attorney for this District and the United States Attorneys for the District of Maryland and for the Eastern District of New York, in which districts the defendant apparently faces other charges, to furnish him with information as to any evidence discovered, directly or indirectly, as a result of the seizure of certain papers and effects from the defendant at the time of his arrest. The decision heretofore made herein renders this aspect of the motion moot, even if this court had the power to act as requested.

IT IS SO ORDERED.

SUPREME COURT OF THE UNITED STATES

No. A-565

CHARLES V. COSTANZA,
Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 8, 1975.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 6th day of January, 1975.

ORDER

(Filed February 11, 1974)

A further evidentiary hearing was had in this case on Friday, February 8, 1974, the court having previously vacated its order heretofore entered denying the motion to suppress. The court, having now considered the evidence vacated its order heretofore entered denying the evidence adduced at both of the hearings, is of the opinion that the arrest and search of July 25, 1973, were not illegal.

It is, therefore, ORDERED that the motion to suppress evidence be, and it is hereby, DENIED.